IRIS U.S.A., Inc. *and* Machinists and Mechanics Lodge No. 2182, Machinists Automotive Trades District 190 of Northern California. Cases 32–CA–17763–1 and 32–RC–4669

November 9, 2001

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On April 5, 2001, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging party filed cross-exceptions and a brief supporting the judge's decision and in support of cross-exceptions. The Respondent filed an answering brief to the Charging Party's cross-exceptions

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order and direct a second election.

We adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by maintaining a rule in its handbook that instructs employees to keep information about employees strictly confidential.[1] Contrary to our dissenting colleague, we also adopt the judge's finding that the Respondent's maintenance of this unlawful rule constitutes objectionable conduct warranting setting aside the election.

It is well settled that conduct in violation of Section 8(a)(1) that occurs during the critical period prior to an election is "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). The Board has recognized a narrow exception to this rule for conduct that is so minimal or isolated that "it is virtually impossible to conclude that the misconduct could have affected the election results." *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).[2] The judge correctly found that this case does not fall within this narrow exception.[3]

Although the maintenance of the unlawful rule is the sole unfair labor practice found here, the rule applied to the entire bargaining unit. The rule was published in the Respondent's employee handbook, which was disseminated to all unit employees. The Board has long held that the mere maintenance of an unlawful rule "serves to inhibit the employees' engaging in otherwise protected organizational activity." *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970).[4] Additionally, the rule here was strengthened by language adding that "[a]ny doubts about the confidentiality of information should be resolved in favor of confidentiality." By this language, which sent the clear message to its employees that any questions about the applicability of this rule must be resolved on the side of prohibiting the disclosure of the information, the Respondent further suggested to employees that engaging in certain Section 7 activities would not be tolerated. In these circumstances, we find that the Respondent's maintenance of this unlawful rule during the critical period may have directly accounted for

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by maintaining a confidentiality provision in its employee handbook, we note that the provision is similar to the confidentiality clause found unlawful in *Flamingo Hilton-Laughlin,* 330 NLRB No. 34 (1999), in that it specifically instructs employees to keep information about "employees" "strictly confidential." Moreover, the Respondent's confidentiality provision goes further than its counterpart in *Flamingo Hilton-Laughlin*, by additionally instructing employees "to resolve in favor of confidentiality" "[a]ny doubts about confidentiality" of employee information.

Member Liebman also relies on the rationale that she applied in finding a similar rule unlawful in her joint dissent in *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. F.3d 52 (D.C. Cir. 1999). See also *Super K-Mart*, 330 NLRB No. 29 (1999) (dissenting opinion); *Flamingo Hilton-Laughlin*, supra at fn. 3.

[2] We note that the dissent erroneously characterizes the above recitation of this well-settled rule and narrow exception as a "per se rule" whereby "any" 8(a)(1) violation requires overturning an election. This characterization of the rule ignores the fact that there is indeed an exception to the rule, even if it is a narrow and limited one.

[3] As the judge explained, campaigning for or against union representation typically involves discussion of wages, hours and working conditions, and by inhibiting the employees' discussion of these matters, the Respondent's maintenance of the unlawful handbook rule impaired the employees' ability to campaign for their preferred position.

[4] Our colleague's reliance on the absence of evidence of specific conduct by the Respondent to enforce the rule in a manner that prohibited employees from discussing terms and conditions of employment, and his reliance on the fact that the rule was maintained rather than adopted during the critical period, is misplaced. It is well settled that the maintenance of an unlawful rule is objectionable conduct sufficient to warrant setting aside an election. E.g., *Mervyn's*, 240 NLRB 54, 61 fn. 16 (1979) (mere maintenance of an unlawful no-solicitation rule warrants setting aside an election even in the absence of evidence that it was enforced in connection with employees' concerted or union activities). In this case, where the Respondent's maintenance of its unlawful rule during the critical period violated Sec. 8(a)(1), the applicable standard is whether it is virtually impossible to conclude that the maintenance of the rule *could have* affected the election results, not whether there is *additional* evidence of conduct restraining employees' Sec. 7 activity. *Clark Equipment Co.*, supra. Because employees could reasonably believe that they could be subject to disciplinary consequences if they engaged in Sec. 7 conduct violative of the rule, it is reasonable to conclude that the maintenance of the rule *could have* affected the election results.

the Petitioner's margin of defeat. Accordingly, we shall adopt the judge's findings and direct a new election.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and orders that the Respondent, IRIS U.S.A., Inc., Stockton, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director for Region 32 deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the Machinist and Mechanics Lodge No. 2182, Machinists Automotive Trades District 190 of Northern California.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. November 9, 2001

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

I agree with my colleagues that the rule is unlawful. In doing so, I note particularly that the rule prohibits employees from, inter alia, disclosing information about employees to anyone, including other employees. Thus, based on its literal terms, an employee could interpret the provision to mean that he/she could not discuss wages with other employees or with a union representative.

However, contrary to my colleagues, I do not agree that the Respondent's mere maintenance of this unlawful rule warrants the overturning of the election. My colleagues argue that any 8(a)(1) violation "a fortiori . . . interferes with an election," and requires that the election be set aside. I do not agree. As I explained in my partial dissent in *Diamond Walnut Growers*, 326 NLRB 28, 32 (1998), I would not apply a per se rule that any unfair labor practices committed during the critical period requires the overturning of an election. Nor would I apply the "virtually impossible" test of my colleagues.[1] Instead, I will evaluate each case on its own facts to determine whether, in all of the circumstances, the conduct was such as to impair the election process.

In the instant case, such impairment is not shown. Instead, there was a single unfair labor practice, viz. the mere maintenance of a preexisting rule that prohibited, in relevant part, the unauthorized disclosure of certain information about the company or its employees and cus-

[5] In finding that the Respondent's maintenance of the confidentiality rule warrants setting aside the election, the judge relied on the Board's decision in *Adtranz, ABB Daimler-Benz*, 331 NLRB No. 40 (2000). We note that although the D.C. Circuit denied enforcement of the Board's order in that case, finding that the employer's rules did not violate Sec. 8(a)(1), the Court did not address the Board's finding that the maintenance of unlawful workplace rules warrants setting aside the election. *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001).

[1] See my dissent in *Spring Industries,* 332 NLRB No. 10 (2000). As I indicated therein, although I do not necessarily subscribe to the "virtually impossible" standard, I find that, in the instant case, even that stringent standard is satisfied.

tomers. The rule antedated the Union's campaign. There is no evidence that this rule was promulgated in response to any union or protected activity. Nor is there any evidence that the rule was ever enforced in connection with the Union or other concerted activity. Indeed, there is no evidence that the Employer applied the rule at any relevant time. Finally, [t]here is no evidence that the rule caused any employee to refrain from discussing wages, hours, and terms and conditions of employment, or in any way impeded exercise of protected rights during the critical period prior to the election. Although the particular rule here violated Section 8(a)(1) because of its potential to interfere with a Section 7 right, there is absolutely no evidence that it had an effect on the election. Thus, I find it "virtually impossible to conclude that the [mere maintenance of the rule] could have affected the election results." *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

I recognize that the election was close 43–43. However, In light of the total absence of evidence of impact, I cannot conclude that the rule affected the election results in any manner.

My colleagues rely on *Mervyn's*, 240 NLRB 54, 61 fn. 16 (1979). The case is clearly distinguishable. In *Mervyn's*, the rule explicitly forbade solicitation. In the instant case, the rule could be construed to forbid discussion of wages. Although both rules are unlawful, I would not find, without more, that the mere maintenance of the latter rule interfered with the election process.

Accordingly, although I agree with my colleagues that the Respondent's maintenance of the non-disclosure rule was unlawful, I cannot conclude that the mere maintenance of the rule was objectionable conduct warranting overturning the election. I would certify the election results.

Dated, Washington, D.C. November 9, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

Kenneth Ko, Esq., of Oakland, California, for the General Counsel.

Mitchell S. Chaban, Esq. (Masuda, Funai, Eiffert & Mitchell, LTD), of Chicago, Illinois, for the Employer/Respondent.

David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Petitioner/Charging Party.

DECISION

STATEMENT OF THE CASE

Mary Miller Cracraft, Administrative Law Judge. On December 14, 2000, the parties submitted a stipulation of the relevant facts in this controversy regarding a confidentiality clause contained in an employee handbook. It is contended that this confidentiality clause not only interfered with employee rights in violation of Section 8(a)(1) of the Act but also destroyed the laboratory conditions necessary for conducting a fair election.

The parties were afforded full opportunity to argue the merits of their respective positions. On the entire record and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Iris U.S.A., Inc. (Respondent) is an Illinois corporation with an office and place of business in Stockton, California, where it manufactures and sells plastic mold injected products. During the 12-month period ending July 24, 2000, Respondent sold and shipped goods or provided services valued in excess of $50,000 directly to customers located outside the State of California. The parties stipulate and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The parties stipulate and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Procedurally, this matter arises from a petition for representation filed by the Union on August 30, 1999[1] in Case 32–RC–4669. Pursuant to a stipulated election agreement approved by the Regional Director for Region 32, a secret ballot election was conducted on October 8 in a unit of machine operators, distribution employees and assembly/shrink employees.[2] The tally of ballots showed that of approximately 105 eligible voters, 43 cast ballots for, and 42 against, the Union. There were no void ballots and one determinative challenged ballot.

On November 16, the Regional Director issued a Report and Recommendation on Challenged Ballot that recommended that the challenge to the ballot be overruled. The Board issued an Order directing the Regional Director to open and count the

[1] All dates are in 1999 unless otherwise referenced.

[2] The unit description is as follows:

All full-time and regular part-time machine operators, distribution employees, and assembly-shrink employees employed by the Employer at its Stockton, California facility; excluding all office clerical employees, leads, assistant leads, guards, and supervisors as defined in the Act.

challenged ballot on December 7. On December 13, the challenged ballot was opened and counted. The revised tally of ballots reflects a final tally of 43 ballots cast for, and 43 against, representation by the Union.

Meanwhile, on October 14, the Union filed objections to conduct affecting the election. The Regional Director issued a Report and Recommendation on Objections on March 20, 2000. The Union filed exceptions to this report. On June 14, 2000, the Board issued its Decision and Order remanding the objection regarding the employee handbook confidentiality clause for hearing.

In addition, on October 25, the Union filed an unfair labor practice charge in Case 32–CA–17763-1 alleging, inter alia, that Respondent maintains a rule which restricts the rights of employees to engage in union and/or protected activity. On February 25, 2000, the Regional Director dismissed this charge. The Union appealed and the General Counsel reversed in part and sustained in part the Regional Director's dismissal of the charge. On July 24, 2000, the Regional Director issued an order consolidating Cases 32–RC–4669 and 32–CA–17763–1 as well as a complaint and notice of hearing in Case 32–CA–17763–1.

B. Facts

For a number of years, Respondent has published an employee handbook. This handbook was last revised and published on January 5, 1998. This handbook, distributed to all employees, including all bargaining unit employees, in January 1998, governs employment of Respondent's employees. Regarding employees hired after distribution of the January 5, 1998 handbook, Respondents practice was to give each newly-hired employee a copy of the handbook. These employees were requested to sign a receipt and acknowledgment which was then placed in their personnel file. Portions of the handbook have been revised from time to time after January 5, 1998.

When implementing policies and disciplining employees, Respondent has enforced various provisions of the handbook. The parties agree that the handbook was not published or distributed in response to any organizing drive by a union.

The employee handbook published on January 5, 1998, contained the following provisions, which were in force and effect during the Union's organizing drive in 1999:

Confidential Information

> During the course of your employment, you may come into the possession of trade secrets or confidential information belonging to IRIS, including customer lists and information, financial information, leases, licenses, agreements, sales figures, business plans, and proprietary information. All of the information, whether about IRIS, its customers, suppliers, or employees is strictly confidential. This information must not be disclosed to anyone, including family members, individuals outside IRIS, or to any IRIS employee who is not entitled to the information, either during or after your employment. Any doubts about confidentiality of information should be resolved in favor of confidentiality.
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> . . . .
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> Each employee's personnel records are considered confidential and will normally be available only to the named employee and senior management.
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> . . . .
>
> COMPANY RULES STRICTLY ENFORCED
>
> Misconduct
>
> It is not possible to provide a complete list of every possible offense that will, like unsatisfactory job performance, result in discipline, including discharge. However, in order to give you some guidance, examples of unacceptable conduct are listed below.
>
> . . . .
>
> Unauthorized disclosure or use of any confidential information about IRIS, its employees or its customers, or any trade secrets that you have learned through your employment with IRIS.

The disciplinary provisions of the employee handbook are only enforced if an employee violates one or more of the other provisions of the employee handbook or engages in any type of misconduct which may not be specifically set forth in the employee handbook. None of the provisions set forth above were revised during or after the Union's organizing drive nor were they enforced in reaction to union activity in 1999.

Personnel records of an employee contain information about the employee's medical conditions, medical leaves of absence, workers' compensation claims and release forms from doctors describing the nature of the illnesses or injuries suffered by employees. The personnel records may also contain information about the employees' wages, hours of employment, benefits, job classifications, promotions and other personnel-related actions, personal and family matters, including restraining orders issued in response to domestic violence and wage garnishments. Restraining orders name family members or non-employees and wage garnishments name companies to whom employees owe money. Personnel records also contain information about the employee's authorization to work in the United States, including the Immigration and Naturalization Service Form I-9 and other information such as visas, copies of drivers licenses and other personal documents. Personnel records also include memoranda from employees about other employees and supervisors and from supervisors about employees. These memoranda may include information and allegations about such matters as alleged discrimination, harassment and other information about the conduct of employees and supervisors.

During the period of time from January 5, 1998, to the time of hearing, no employees have been disciplined, either orally or

in writing, for any disclosure of trade secrets or confidential information belonging to Respondent, including customer lists and information, financial information, leases, licenses, agreements, sales figures, business plans, and proprietary information and information about Respondent, its customers, suppliers or employees. No employees have been disciplined, either orally or in writing, for revealing information in their own or other employees' personnel records to other employees or non-employees. During the period of time from January 5, 1998, to the date of hearing, no employees have been disciplined, either orally or in writing, for any alleged unauthorized disclosure, use or discussion of any confidential information about Respondent, its employees or its customers or any trade secrets that an employee may have learned about through his or her employment with Respondent.

C. Overview of the Law

Before examining the parties' contentions, a brief examination of recent Board decisions dealing with unenforced company rules prohibiting discussion between employees of "confidential" information is useful. As the full Board stated in *Lafayette Park Hotel,*[3]

> In determining whether the mere maintenance of rules . . . violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. See *NLRB v. Vanguard Tours,* 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation [v. NLRB],* 324 U.S. [793], at 803 fn.10.

In *Lafayette Park Hotel,* one of the specific rules at issue provided that, "Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information" was unacceptable conduct. In agreement with the employer, a majority of the Board (Members Hurtgen and Brame, former Chairman Gould concurring, Members Fox and Liebman dissenting) held that the rule did not on its face cover employee wage discussions but merely prohibited the disclosure of private information stating, "We do not believe that employees would reasonably read this rule as prohibiting discussion of wages and working conditions among employees or with a union."[4] The Board specifically noted that the rule did not bar discussions of "terms and conditions of employment" or "employee problems."[5]

In two subsequent cases, the Board has considered the reasonable tendency of employer confidentiality provisions to chill Section 7 rights relying on the standard set forth in *Lafayette Park Hotel.* In *Super K-Mart,* 330 NLRB No. 29 (1999), the rule at issue stated, "Company business and documents are confidential. Disclosure of such information is prohibited." Members Hurtgen and Brame (Member Liebman dissenting) held that employees would reasonably understand that this rule did not prohibit discussion of wages or working conditions.

In *Flamingo Hilton-Laughlin,* 330 NLRB No. 34, (1999), at page 6, the employer's code of conduct provided, "Employees will not reveal confidential information regarding our customers, fellow employees, or Hotel business." The employer's disclosure rules further provided,

> Much of the Hotel business is confidential and must not be discussed with any party not associated with the Hotel. You should use discretion at all times when talking about your work. The Hotel considers all information not previously disclosed to outside parties by official Hotel channels to be proprietary information. Questions or calls from news media should be immediately transferred and responded to by the Marketing Department or the President of the Hotel. At no time should you talk to the media about Hotel operations.
>
> If you should discuss or disclose proprietary information, you may be subject to disciplinary action, up to and including termination.

In adopting the administrative law judge's finding that maintenance of the code of conduct and disclosure rules violated Section 8(a)(1), the Board majority (Chairman Truesdale and Member Liebman) distinguished it from the rule in *Lafayette Park Hotel*, noting that the above rule specifically prohibits employees from revealing confidential information about fellow employees.[6] Member Brame would not adopt the judge's finding, stating that the above rules were not meaningfully distinguishable from those in *Lafayette Park Hotel.*[7]

D. Contentions

Counsel for the General Counsel contends that Respondent's rules are unlawful under the test set forth in *Lafayette Park Hotel.* Counsel distinguishes the result reached in *Lafayette Park Hotel,* noting that the standard of conduct therein prohibited employees from divulging "hotel-private information to employees or other individuals or entities that are not authorized to receive that information" while the employee handbook

[3] 326 NLRB 824, 825, 829 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The above language is quoted from the opinion of Members Hurtgen and Brame. Former Chairman Gould concurred. Members Fox and Liebman stated that they agreed this was the appropriate standard. Id. at 830. Member Hurtgen stated at fn. 5, that he would not so limit the inquiry. "If a rule reasonably chills the exercise of Sec. 7 rights, it can nonetheless be lawful if [it] is justified by significant employer interests (e.g., a rule against solicitation during working time chills Sec. 7 exercise for that period. But, the rule is valid because the employer has a significant interest in having worktime set aside for work."

[4] *Lafayette Park Hotel*, supra, 326 NLRB at 826.

[5] Id. 326 NLRB at 826 fn. 12.

[6] *Flamingo Hilton-Laughlin*, supra, slip op. at 2, fn. 3.

[7] Id., slip op. at 2, fn. 4.

at issue here characterizes employee information as strictly confidential.

Counsel for the General Counsel notes that in two subsequent cases, the Board considered similar rules. In *Super K-Mart,*[8] the Board held lawful a rule which prohibited disclosure of "company business and documents," while in *Flamingo Hilton-Laughlin,*[9] the Board held unlawful a rule which prohibited revealing confidential information regarding, "our customers, fellow employees, or Hotel business." Counsel argues that Respondent's handbook provisions, which define and prohibit unauthorized disclosure of confidential information, are far broader than those found lawful in *Lafayette Park* and *Super K-Mart* and that they are more similar to those in *Flamingo Hilton-Laughlin.*

Counsel for the General Counsel and counsel for the Charging Party both note that Respondent's rule sets forth examples of conduct which are included within its prohibition on divulging confidential information. They argue that the rule must, accordingly, be construed as broader than the examples set forth and therefore found unlawful.

Counsel for the General Counsel also notes that the rules do not adequately advise employees that the prohibitions set forth are not applicable to wages and working conditions nor do the rules advise employees that they are free to discuss these matters with other employees and outsiders as well.

Counsel for the General Counsel argues that because the handbook specifically states that employee personnel records are considered confidential, employees would reasonably conclude that unauthorized disclosure includes information about their own wages and working conditions. Because Respondent advises employees that all doubts should be resolved in favor of confidentiality and because Respondent includes disclosure of confidential information as a cause for discipline, counsel asserts that the rule unlawfully interferes with employees" right to discuss wages and working conditions with fellow employees and outsiders such as unions.[10]

Alternatively, counsel for the General Counsel urges that *Lafayette Park Hotel* was incorrectly decided and should be reconsidered. Counsel asserts that *Lafayette Park Hotel* represents a departure from the Board's traditional application of the analysis for no-solicitation, no-distribution rules when analyzing rules regarding confidential information.[11] Thus, "instead of placing the burden of interpreting employer rules on employees, the Board should recognize that in many circumstances it is the very ambiguity of the rule which gives rise to its overbreadth. . . ."

Counsel for the Charging Party notes that the rule was not adopted in response to a union organizing effort nor is there evidence that the rule was discriminatorily or disparately applied. Nevertheless, counsel argues that on its face, the rule prohibits employees from engaging in disclosure of information to other employees or to union organizers for the purposes of engaging in protected concerted activity, that is, to assist in organizing, for purposes of collective bargaining, or to assist the union in boycotting and other lawful forms of protected concerted activity.

Counsel for the Charging Party notes that the rule in question specifically precludes disclosure of confidential information about employees. The rule makes clear that personnel records are confidential. The rule also defines confidential information belonging to Respondent, in part, as information about employees. Employees who disclose confidential information are subject to discipline, including discharge. Counsel asserts that employers cannot prohibit disclosure of such information because that information is basic to the ability of employees to organize.[12] Counsel also asserts that the rule herein is broad in its prohibition and must be read in the context of the further aid which advises employees to resolve any doubts in favor of confidentiality.

Counsel for Respondent asserts that the rule does not reasonably tend to restrain or coerce employees because no employee would reasonably understand that the policy, which covers only private and proprietary information, prohibits employees from discussing the terms and conditions of their employment or engaging in Section 7 activity.[13] Counsel asserts that this conclusion is based upon the plain language of the rule, noting that the rule must be construed with the language immediately preceding it, the Business Ethics section, which states in part that, "It is crucial that you observe all applicable laws and regulations while conducting business on IRIS" behalf." Counsel also notes that Respondent's rules do not expressly prohibit employees from discussing wages and terms of employment.[14] Counsel avers that Respondent has never enforced the policy to prohibit or punish employees from engaging in Section 7 activity; there is no evidence that employees do not discuss wages and benefits; and the confidentiality policy was not promulgated in response to union activity. Finally, Respondent asserts that even if the Board determines that the

[8] Supra, 330 NLRB No. 29 (1999).

[9] Supra, 330 NLRB No. 34 (1999).

[10] Counsel cites *Meadows East, Inc.,* 275 NLRB 1322, 1327 (1985); *Vanguard Tours,* 300 NLRB 250, 264 (1990), enfd. in relevant part, 981 F.2d 62 (2d Cir. 1992); and *Kinder-Care Learning Centers,* 299 NLRB 1171, 1171–1172 (1990).

[11] Counsel's arguments in this regard are addressed to the Board, not to the administrative law judge. In any event, counsel argues that any rule which, by overbreadth, proscribes protected discussion of wages and working conditions, should be presumed unlawful.

[12] Counsel cites *Flamingo Hilton-Laughlin,* supra; *Niles Co.*, 328 NLRB 411 (1999); *Kinder-Care Learning Centers,*supra; *Waco, Inc.,* 273 NLRB 746 (1984).

[13] Respondent cites *Lafayette Park Hotel,* supra, 326 NLRB at 824 fn. 2 (1998); *Super K-Mart,* supra.

[14] Counsel distinguishes cases in which such rules have been held invalid, citing *L. G. Williamson Oil Co.,* 285 NLRB 418, 423 (1987), and *NLRB v. Vanguard Tours,* 981 F.2d 62, 66–67 (2d Cir. 1992).

policy violates Section 8(a)(1), the policy, nevertheless, did not interfere with employees free choice in the election.

E. Discussion

1. Whether mere maintenance of the rule would reasonably tend to chill employees in the exercise of their Section 7 rights

The parties agree that Respondent has not enforced any of its confidentiality rules in connection with the union activity in 1999. Thus, the complaint alleges only maintenance of the confidentiality rules, not application of those rules.

However, as *Lafayette Park Hotel* makes clear, the absence of enforcement of a rule does not prohibit a tendency to restrain and coerce employees. Looking then to the rule stripped of extraneous verbiage, it provides essentially that information about its employees is strictly confidential and must not be disclosed to anyone including any other employee who is not entitled to the information.

Literally read, this rule may be reasonable understood to prohibit employees from discussing their wages, hours, and terms and conditions of employment with each other. The overall context of the Respondent's rules does not alleviate a literal reading. Hence, the admonition, "Any doubts about confidentiality of information should be resolved in favor of confidentiality" and the further restriction, "Each employee's personnel records are considered confidential and will normally be available only to the named employee and senior management," must inform a reading of the rule. Reading the rule in light of these contextual references further strengthens an understanding that employee information is strictly confidential.

Finally, the rule states that unauthorized use of confidential information about employees may result in discipline, including discharge. This admonition, as well as the two above, compel a reasonable understanding of Respondent's rule to prohibit employees from discussing their wages, hours, and terms and conditios of employment with other employees. Thus I conclude that even in the absence of failure to enforce the rules, and although the rules were not promulgated because of union activity, the rules reasonably tend to restrain and coerce employees because they tend to prohibit employees from discussing their wages, hours, and terms and conditions of employment with each other. Respondent's rule is thus distinguishable from the rules in *Lafayette Park Hotel* and *Super K-Mart* because Respondent's rule specifically prohibits disclosure of employee information to fellow employees.

The rule in question in *Lafayette Park Hotel* stated that it was unacceptable for employees to divulge "Hotel-private" information to employees or other individuals. The Board majority noted that the rule was not ambiguous and did not on its face cover discussion of employee wages. The majority held that employees reasonably would understand that the rule was designed to protect employer proprietary information and would not reasonably construe the rule to preclude them from disclosing their wages to banks or credit agencies or from discussing their wage information with other employees. Id. 326 NLRB at 826. Unlike the rule in *Lafayette Park Hotel,* Respondent's rule classifies information about employees as confidential and warns that disclosure to other employees can lead to discharge.

In *Super K-Mart*, the company's confidentiality provision barred disclosure of company business and documents: "Company business and documents are confidential. Disclosure of such information is prohibited." The rule did not literally bar employees from discussing wages or working conditions. The Board (Members Hurtgen and Brame; Member Liebman dissenting) concluded that employees would understand that the rule was designed to protect the confidentiality of private business information but not to prohibit discussion of wages or working conditions. The Board noted that failure to enforce the rule in such a manner reinforced their understanding of reasonable employee interpretation. On the contrary, Respondent's rule does not readily lend itself to an interpretation of applicability only to private business information. Accordingly, failure to enforce the rule does not support the same inference drawn in *Super K-Mart.*

I find Respondent's handbook provision is more similar to the rule considered in *Flamingo Hilton-Laughlin,* supra. The judge found therein that the employer's code of conduct regarding disclosure was unlawful. The rule provided, "Employees will not reveal confidential information regarding our customers, fellow employees, or Hotel business." In affirming the judge's finding, Chairman Truesdale noted that the rule was distinguishable from the rule found lawful in *Lafayette Park.* Member Liebman agreed with the Chairman that the rule was unlawful, but for the reasons set forth in her dissent in *Lafayette Park.* Member Brame, dissenting, would not adopt the judge's finding and would not distinguish it from the rule in *Lafayette Park.* Id. slip opinion at page 2, footnote 3. Based upon the holding in *Flamingo Hilton-Laughlin,* I find Respondent's rule unlawful

2. Whether mere maintenance of the rule during the laboratory period improperly interfered with the election process

Remaining for decision is a determination of whether the mere maintenance of the unlawful rule interfered with the election process. In *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786 (1962), the Board held that conduct which violates Section 8(a)(1) is, a fortiori, "conduct which interferes with the exercise of a free and untrammeled choice in an election." In *Clark Equipment Co.,* 278 NLRB 498, 505 (1986), the Board observed that it, "has departed from [the a fortiori] policy only when it is virtually impossible to conclude that the misconduct

could have affected the election results."[15] In these exceptional cases, the Board has looked to the absence of other violations, the severity of the incident, extent of dissemination, the size of the unit, and other relevant factors in order to determine whether the misconduct could have affected the election results.[16]

Respondent argues that the only alleged unlawful conduct is mere maintenance of the confidentiality policy, noting that all other objections to the election were dismissed. Respondent asserts that mere maintenance of the policy, which was not adopted in response to union activity and was never enforced to prohibit any employee from engaging in Section 7 activity, cannot have interfered with the election. Respondent notes that no employee has ever been disciplined for discussing wages or working conditions or for engaging in Union activity or for discussing wages and benefits during the election campaign. Respondent avers that other cases in which the Board refused to overturn election results in the face of 8(a)(1) violations indicate that a similar result should be reached here, citing *Recycle America,* 310 NLRB 629 (1993), and *Overnite Transportation Co. v. NLRB,* 104 F.3d 109 (7th Cir. 1997), enfg. 319 NLRB 646 (1995).

In my view, this is not one of those exceptional cases in which it is virtually impossible to conclude that the misconduct could have affected the election results. Although only one unfair labor practice has been found and although this unfair labor practice involves mere maintenance of an unlawful rule which was not promulgated or discriminatorily enforced because of Union activity, the rule covered the entire bargaining unit and could reasonably be understood to prohibit discussion of wages, hours, and terms and conditions of employment among employees. The election vote was tied. Under these circumstances, I cannot conclude that it was virtually impossible for maintenance of the rule to interfere with the election process.[17]

Respondent's reliance on *Recycle America,* supra*,* does not persuade me that a different result should be reached. It is distinguishable based upon lack of dissemination and severity of misconduct. The employer's parent corporation's human relations manager interrogated and solicited grievances from an employee and requested the employee, a known union supporter, to campaign against the union. There was no evidence of dissemination of these remarks among the 45 employees eligible to vote and the last incident occurred 1 month prior to the election. The Board ordered the regional director to open and count the ballots finding that the conduct was insufficient to affect the results of the election.

Similarly, I find Respondent's reliance on *Overnite Transportation Co.,* supra*,* unavailing. The union photographed and video taped employees, after obtaining their consent, at a location remote from the polling area. This did not amount to campaign surveillance and was held to be innocuous. Accordingly, no unfair labor practice occurred and the case does not require a similar result herein.

Although no party has cited *Machinists (Burkart Foam)*, 286 NLRB 417 (1987), to me, some discussion of its holding is appropriate. In the final analysis, I find it is distinguishable. In *Machinists (Burkart Foam)*, a decertification election was conducted in the midst of a strike. The revised tally of ballots indicated 229 votes for and 197 against the union. The union maintained, but did not enforce, an unlawful constitutional restriction on a member's right to resign during the critical period preceding the election. The Board held that this restriction violated Section 8(b)(1)(A). However, the Board found no interference with the election stating, "the relationship between the constitutional provision and the employees" freedom to campaign and vote in the decertification election is too tenuous to warrant a finding that the mere existence of that provision amounted to objectionable conduct." Id*.* at 419. Specifically, the Board noted that the restriction on resignation did not impair employees" ability to campaign for their preferred position during the election period. In the instant case, however, Respondent's rule does impair employees" ability to campaign for their preferred position. Campaigning either for or against union representation typically involves discussion of wages, hours, and working conditions. Accordingly, I do not find the holding in *Machinists (Burkart Foam)* applicable herein.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by maintaining a rule regarding confidential information which would reasonably tend to chill employees in the exercise of their Section 7 rights.

4. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. By maintaining a rule regarding confidential information which would reasonably tend to chill employees in the exercise of their Section 7 rights, Respondent has illegally interfered with the representation election conducted by the Board in Case 32–RC–4669.

[15] See also, *Wayne County Neighborhood Legal Services,* 333 NLRB No. 15, slip op. at 3 (2001); *Sea Breeze Health Care Center,* 331 NLRB No. 149, slip op. at 3 (2000).

[16] See, e.g., *Reeves Bros. Inc.,* 320 NLRB 1082, 1085 (1996); *Airstream, Inc.,* 304 NLRB 151, 152 (1991), enfd. 963 F.2d 373 (6th Cir. 1992).

[17] A similar result was reached in *Adtranz, ABB Daimler-Benz,* 331 NLRB No. 40 (2000). In that case, the employer maintained a rule requiring employees to obtain prior authorization before engaging in solicitation and distribution and a rule against abusive or threatening language. Based on maintenance of these two rules, a new election was ordered.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, IRIS USA, Inc., Stockton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule regarding confidential information which would reasonably tend to chill employees in the exercise of their Section 7 rights.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Amend the employee handbook by rescinding the unlawful rules regarding confidential information.

(b) Within 14 days after service by the Region, post at its facility in Stockton, California, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Regional Director for Region 32 shall set aside the representation election in Case 32–RC–4669.

Dated, San Francisco, California April 5, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain provisions in our employee handbook which prohibit employees from discussing their wages, hours, and terms and conditions of employment with each other.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revise our employee handbook by rescinding the unlawful confidentiality provision.

IRIS U.S.A., INC.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."